United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

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IN THE

UNITED STATES COURT OF APPEALS

For The Second Circuit

UNITED STATES OF AMERICA,

Plaintiff - Appellee

VS.

MOZELLE WILLIAMS,

Defendant - Appellant

Appeal From The United States District Court For The Eastern District of New York

Honorable Edward R. Neaher, Presiding Judge

APPELLANT'S REPLY BRIEF

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The issues most strongly urged by the Government in its brief concern what it styles as the two standards for the reasonableness of airport searches in this Circuit. The Government also argues that in any event, Mr. Williams voluntarily consented to the search. These points will be discussed in turn.

I.

THE FACTS OF THIS CASE DO NOT REVEAL THE EXISTENCE OF "COMPELLING CIRCUMSTANCES" AS REQUIRED BY BELL, THE ADVANCE NOTICE OF LIABILITY OF SEARCH EXISTING IN EDWARDS, OR A VOLUNTARY CONSENT.

Mr. Williams will concede that the evidence reveals he tripped the magnetometer on more than one occasion while he passed through it, and that he was not carrying identification. The Government, however, has failed to indicate any evidence in the transcript that Mr. Huttick knew prior to his physical search that Mr. Williams was a selectee. The Government has been forced into a position of stating that the evidence shows that there was nothing in his dealings with

Mr. Williams that could have alerted him that he was not a selectee. (G. Brief p. 16)

The only evidence produced by the Government, prior to Mr. Huttick's physical search, concerning Mr. Williams' situation that morning, was that he activated the magnetometer, and that he had no identification. (App. pp. 10, 11) We do know that Mr. Huttick was called to screen Flight 301 at Gate 26 that morning. (App. p. 6) We know he observed approximately one hundred passengers going through the magnetometer and that five tripped it. (App. p. 41) We do not know if any of the others who tripped the magnetometer were selectees, whether or not they were searched, and their ultimate fate. The Government would have us believe that Mr. Huttick had to know Mr. Williams was a selectee simply because he had been called to screen the flight that morning. The record permits no such assumptions. The question is not whether Mr. Williams met the profile, and his ticket was marked accordingly, but whether Mr. Huttick knew these facts prior to his physical search. Mr. Williams urges that the record is silent on both important questions.

The question then becomes one of whether or not Mr. Huttick's knowledge, and that of Mr. Williams, prior to his search, was sufficient to meet the tests

established in this district.

In United States v. Edwards, 498 F. 2d 496 (2d Cir. 1974) Judge Friendly said the danger alone meets the reasonableness test, as long as the passenger has been given advance notice of the fact that he or his baggage may be searched so that he may avoid it by deciding not to travel. The Edwards flight was a shuttle flight and thus had no profile or question of lack of identification and the Court also mentioned there was no removal to another area as in United States v. Ruiz-Estrella, 481 F. 2d 723 (2d Cir. 1973). Judge Friendly did say that the important thing was that signs were posted in prominent places concerning the possibility of a search and an announcement was made on a loud speaker that all carry-on luggage would be searched prior to boarding. This, the Judge said, gave fair warning to Edwards of the impending search and she chose to ignore it.

The Government claims Mr. Williams was also given a fair warning of a possible search because signs were posted. The only evidence in support of this is Mr. Huttick's statement that he had seen them, but he did not know in what position or on what wall they were on at the gate. (App. p. 29) If Mr. Huttick, who had worked at this job for three months, one of which was

with T. W. A., (App. p. 31) had no knowledge of where the sign was posted, how can we say Mr. Williams must have seen and read this warning. In fact, Mr. Williams stated that he had not seen any signs that persons would be searched. (App. p. 55) Mr. Williams was also removed to the closed walkway under color of badge, and searched in a spread eagle fashion. (App. p. 12, p. 15)

The Government failed under these facts to prove that Mr. Williams was given a "fair warning" prior to the physical search of himself and his bag.

Judge Oakes in his concurring opinion in Edwards did not agree with Judge Friendly's justification for the search but said that the search was justified on a consent basis. He said that Edwards had no inherently coercive situation, signs were prominently posted, the announcement was made, and she consented. The facts in Mr. Williams' case show a highly coercive situation, with no announcement and no proof of the adequate posting of signs. The only element existing would be his verbal consent, which he denied, but under the present state of the law, it could hardly be considered to be a voluntary consent. Under neither of the tests can Mr. Williams' search be upheld.

In United States v. Clark, 498 F. 2d 535 (2d Cir. 1974) (Clark "II") Judge Oakes applied the "compelling

circumstances" test of United States v. Bell, 464 F. 2d 666 (2d Cir. 1972) to the facts of the case and justified the search. In Clark "II" the defendant met the profile, activated the magnetometer, had no identification and acted strangely. Comparing these facts to those in Bell, which were almost identical, the Court found the search to be valid. Considering that the facts proven by the Government in this case consisted of a positive magnetometer reading and no identification, it can hardly be said that sufficient specific, articulable facts existed which would justify the search.

It is our position that the Government has failed to prove sufficient facts to justify the search under any of the existing Second Circuit tests and that Mr. Williams' motion to suppress should be granted.

Respectfully submitted,

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IN THE

UNITED STATES COURT OF APPEALS

For The Second Circuit

NUMBER 74-8413

UNITED STATES OF AMERICA,
Plaintiff - Appellee

VS.

MOZELLE WILLIAMS,
Defendant - Appellant

A F F I D A V I T

MARTIN H. KINNEY being first duly sworn upon his oath says: That on the 11th day of March, 1975, he filed with the Court, twenty-five (25) copies of Defendant-Appellant's Reply Brief, in the above entitled cause, by depositing the same in the United States mail, at Merrillville, Indiana, properly addressed to:

Clerk, United States Court of Appeals
For The Second Circuit
United States Courthouse
Foley Square
New York, New York 10007

Martin H. Kinney

Subscribed and sworn to before me this 11th day of March, 1975.

Rose Mehos, Notary Public

My commission expires:

October 27, 1975

IN THE

UNITED STATES COURT OF APPEALS

For The Second Circuit

NUMBER 74-8413

UNITED STATES OF AMERICA,

Plaintiff - Appellee

VS.

MOZELLE WILLIAMS,

Defendant - Appellant

A F F I D A V I T

MARTIN H. KINNEY being first duly sworn upon his oath deposes and says: That on the 11th day of March, 1975, he served two copies of Defendant-Appellant's Reply Brief, in the above entitled cause, by depositing the same in the United States mail at Merrillville, Indiana, properly stamped and addressed to:

Mr. Paul B. Bergman
Assistant United States Attorney
United States Attorney's Office
Eastern District of New York
225 Cadman Plaza East
Brooklyn, New York 11201

Martin H. Kinney

Subscribed and sworn to before me this 11th day of March, 1975.

Rose Mehos, Notary Public

My commission expires:

October 27, 1975